88-277

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SEAWINDS LIMITED,
Petitioner,

v.

NEDLLOYD LINES, B.V., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Dated: August 11, 1988

QUESTION PRESENTED

Should Section 108(a) of the Bankruptcy Code (11 U.S.C. §108(a)), which provides for an extension of time periods for commencing legal actions which are fixed by applicable nonbankruptcy law, be applied to extend the one-year time period for commencing a private maritime antitrust action which is fixed in Section 20(e)(2)(B) of the 1984 Shipping Act (46 U.S.C. §1719(e)(2)(B))?

PARTIES TO THE PROCEEDINGS

The petitioner (appellant below) is Seawinds Limited. Seawinds Limited has an ownership interest in the following subsidiaries, none of which is wholly owned: Seawinds International; Oriental Seawinds Liner Agency; Ever-A Shipping Agency; and TransOcean Consolidators.

In addition to Nedlloyd Lines, B.V., appellees below were: Royal Nedlloyd Group, N.V.; KNSM Lines, B.V.; American President Companies, Ltd.; American President Lines, Ltd.; Sea-Land Corporation; Sea-Land Service, Inc.; Dampskibsselskabet AF 1912 A/S; A/S Dampskibsselskabet Svendborg; A.P. Moller-Maersk Line; Hapag-Lloyd Aktiengesellschaft; and Intercontinental Transport (ICT), B.V.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
I. Preliminary Statement	3
II. The Shipping Act Of 1984	3
III. Bankruptcy Code Section 108(a)	4
IV. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	7
ARGUMENT	8
I. This Court Should Decide The Scope To Be Accorded Bankruptcy Code Section 108(a)	8
A. The Courts Below Failed To Recognize That Congress Sought To Preserve For An Extended Period All Causes Of Action the Bankrupt Could Have Pursued On The Date The Bankrupt Filed A Petition For Bankruptcy	8
B. The Courts Below Did Not Recognize That The Application Of Section 108(a) To The One-Year Time Period Fixed In Section 20(e)(2)(B) Of The 1984 Shipping Act Is Consistent With Both The Provisions And The Policies Of The Act	10
C. The Courts Below Utterly Failed To Recognize The Exigencies Of Bankruptcy Which Spurred Congress To Enact The Time Extension Provisions Incorporated In Section 108(a)	11
II. The Decisions Of The Courts Below, If Not Reversed, Will Greatly Hinder Efforts To Protect The Rights Of Bankrupts And Creditors, And Will Result In A Flood Of Costly And Nonmeritorious Lawsuits To Ensure That Such Rights Are Not Forfeited	12
CONCLUSION	14
APPENDICES	
PROOF OF SERVICE	

TABLE OF AUTHORITIES

CASES	PAGE(S)
American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974)	8
Engstrom v. DeVos, 81 F.Supp. 854 (E.D.Wash. 1949)	9
In re Ernest & Associates, Inc., 59 B.R. 495 (Bankr.W.D.Tex. 1985)	11
In re Glenn, 760 F.2d 1428 (6th Cir.), *cert. denied sub nom.* Miller v. First Federal of Michigan, 474 U.S. 849 (1985)	5
In re Graham, 24 B.R. 305 (Bankr.N.D.Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984)	9
In re Petersen, 42 B.R. 39 (Bankr.D.Or. 1984)	9
In re Santa Fe Development and Mortgage Corp., 16 B.R. 165 (Bankr. 9th Cir. 1981)	4, 7
In re Scheffler, 21 F.Supp. 569 (D.N.J. 1937)	7
In re T.C.I. Ltd., 21 B.R. 876 (Bankr. N.D.Ill. 1982)	4, 9
Levine v. Unruh, 99 Ill.App.2d 94, 240 N.E.2d 521 (1968)	9
Morton v. Mancari, 417 U.S. 535 (1974)	10
Natco Industries, Inc. v. Federal Insurance Company, 69 B.R. 418 (S.D.N.Y. 1987)	7, 11
Sproul v. Gambone, 34 F.Supp. 441 (W.D.Pa. 1940)	10
United States v. Whiting Pools, Inc., 462 U.S. 198 (1983)	7

STATUTES AND RULES	
11 U.S.C. § 29(e)	9
11 U.S.C. § 108	*passim*
11 U.S.C. § 1107(a)	2, 4
15 U.S.C. § 1	5
15 U.S.C. § 2	5
15 U.S.C. § 15	5
28 U.S.C. § 1254(1)	2
46 U.S.C. §§ 801 *et seq.*	3
46 U.S.C. §§ 1701-20	3

	PAGE(S)
46 U.S.C. § 1706(c)(2)	2, 4
46 U.S.C. § 1709	4
46 U.S.C. § 1710(a)	4
46 U.S.C. § 1719(e)(2)	*passim*
Fed.R.Civ.P. 12	5

OTHER AUTHORITIES

2 Collier Bankruptcy Manual, Ch. 108 (3d ed. 1985).	9

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v.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Seawinds Limited ("Seawinds") respectfully prays that a writ of *certiorari* issue to review the decision of the Court of Appeals for the Ninth Circuit entered on May 16, 1988.

OPINIONS BELOW

The decision of the Court of Appeals for the Ninth Circuit, officially reported at 846 F.2d 586 (9th Cir. 1988), appears as Appendix ("App.") A. The opinion and judgment of the district court, reported at 80 B.R. 181 (Bankr. N.D.Cal. 1987), appears as App. B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The decision of the Court of Appeals was entered on May 16, 1988.

STATUTORY PROVISIONS INVOLVED

Section 108(a) of the Bankruptcy Code, 11 U.S.C. § 108(a), provides:

> "If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) two years after the order for relief."

Section 1107(a) of the Bankruptcy Code, 11 U.S.C. § 1107(a), provides:

> "Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."

Section 7(c)(2) of the Shipping Act of 1984, 46 U.S.C. § 1706(c)(2), provides:

> "No person may recover damages under section 15 of Title 15, or obtain injunctive relief under section 26 of Title 15, for conduct prohibited by this chapter."

Section 20(e)(2) of the Shipping Act of 1984, 46 U.S.C. § 1719(e)(2), provides:

> "This Act and the amendments made by it shall not affect any suit—
>
> "(A) filed before March 20, 1984; or
>
> "(B) with respect to claims arising out of conduct engaged in before March 20, 1984, filed within 1 year after March 20, 1984."

STATEMENT OF THE CASE

I.

PRELIMINARY STATEMENT

This case presents a pure question of law concerning the applicability of Section 108(a) of the Bankruptcy Code to the so-called "savings provisions" of the Shipping Act of 1984. As the district court acknowledged, this is a "question of first impression." (App. at B-1.) The resolution of this question has broad implications for entities which seek protection under the bankruptcy laws and their creditors, and significantly impacts the rights, powers and duties of trustees in bankruptcy or others who administer the estates of bankrupt entities. In order to place the question in context, it is necessary to describe briefly each of the relevant Congressional acts.

II.

THE SHIPPING ACT OF 1984

The Shipping Act of 1984, 46 U.S.C. §§1701-1720 ("the Act"), was enacted by Congress on March 20, 1984. The Act effected various changes in the law of international ocean commerce while carrying forward several provisions of the otherwise repealed Shipping Act of 1916, 46 U.S.C. §§801 *et seq.* One of the more significant changes effected is contained in

Section 7(c)(2), which provides that private persons are no longer to be permitted to recover damages under the antitrust laws for conduct prohibited by the Act. *See* 46 U.S.C. §1706(c)(2). Prohibited acts are enumerated in 46 U.S.C. §1709. The Act requires that all actions for conduct prohibited in 46 U.S.C. §1709 be brought before the Federal Maritime Commission ("FMC"), which is authorized to award certain reparations for injuries caused by violations of the Act. 46 U.S.C. §1710(a).

Notwithstanding Section 7(c)(2), the Act does not impose an absolute bar on private maritime antitrust actions as of the date of enactment. In "savings" and limitations provisions set forth in Section 20(e)(2), the Act expressly provides that certain causes of action are not subject to the prohibition contained in the former section, including suits arising out of conduct engaged in before March 20, 1984, which are filed within one year after March 20, 1984. *See* 46 U.S.C. § 1719(e)(2)(B).

III.

BANKRUPTCY CODE SECTION 108(a)

Section 108(a) of the Bankruptcy Code provides that, if applicable nonbankruptcy law fixes a period within which the debtor may commence an action, and such period has not expired before the date the debtor files a petition for bankruptcy, the trustee in bankruptcy may file the action on behalf of the bankruptcy estate for up to two years after the order for relief. *See* 11 U.S.C. §108(a).[1] Thus, if three requirements are met, Section 108(a) extends time periods to which a suit brought by a trustee or debtor-in-possession would otherwise be subject. First, applicable nonbankruptcy law must fix a period within which the debtor may commence an action. Second, that period must not have expired before the date of

[1] Although the words of Section 108(a) empower the trustee to act, this section is also enforceable by a debtor-in-possession. *In re Santa Fe Development and Mortgage Corp.*, 16 B.R. 165, 167 n.1 (Bankr. 9th Cir. 1982); *In re T.C.I. Ltd.*, 21 B.R. 876, 878 (Bankr. N.D.Ill. 1982). *See also* 11 U.S.C. § 1107(a).

the filing of the debtor's bankruptcy petition. Finally, the action must be filed by the trustee or debtor-in-possession before the expiration of two years after the order for relief.[2]

IV.

PROCEEDINGS BELOW

On October 22, 1984, Seawinds filed a petition in the Northern District of California for Chapter 11 bankruptcy. Pursuant to that filing, Seawinds became debtor-in-possession of its bankrupt estate, with all the rights and powers of a trustee. On May 9, 1986, Seawinds, in its capacity as debtor-in-possession, filed this lawsuit in the Northern District of California alleging federal antitrust and pendent state law claims. Seawinds alleged, *inter alia*, that appellees conspired, from late 1982 to March 15, 1984, to drive Seawinds out of the trans-pacific container shipping market by fixing reduced tariff rates, and inducing suppliers and potential customers to boycott Seawinds. Counts One through Three alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, for which Seawinds sought damages under 15 U.S.C. § 15.

On July 28, 1986, the appellees jointly moved to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim, primarily arguing that: (1) the challenged conduct falls within the purview of the Shipping Act of 1984; (2) that Act abolished all private antitrust actions for conduct prohibited by the Shipping Act, except for those antitrust actions exempted from its substantive provisions by 46 U.S.C. § 1719(e)(2); and (3) Seawinds' antitrust action did not fall within that exemption.

Seawinds argued, *inter alia*, that its action is immune from the Shipping Act's substantive provisions because the action was filed within the exemption period set forth in 46 U.S.C. § 1719(e)(2)(B), as that period was extended by operation of Bankruptcy Code Section 108(a). Seawinds submitted that 46 U.S.C. § 1719(e)(2)(B) plainly "fixes a period" for commencing an antitrust action, that the October 22, 1984 petition

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[2] The entry of the order for relief is the filing of the petition commencing the bankruptcy case. *In re Glenn*, 760 F.2d 1428, 1437 n.6 (6th Cir.), *cert. denied sub nom. Miller v. First Federal of Michigan*, 474 U.S. 849 (1985).

for bankruptcy was filed within that period, and that the May 9, 1986 antitrust action was filed, as required by Section 108(a), within two years after the filing of the bankruptcy petition.

On June 24, 1987, the district court issued its order granting appellees' motion to dismiss for lack of subject matter jurisdiction. Judgment against Seawinds was entered on June 25, 1987. Crucial to the district court's decision, and the basis for this petition, is the conclusion that Section 108(a) of the Bankruptcy Code may not be invoked to extend the time period for commencing an antitrust action set forth in Section 20(e)(2)(B) of the Shipping Act.

The district court conceded that Section 20(e)(2)(B) can be said to "fix a period" for commencing a private maritime antitrust action to the extent that it exempts from the substantive provisions of the Shipping Act all actions filed within one year of the date of enactment. Nonetheless, the district court declined to apply Section 108(a) to extend the time period fixed in Section 20(e)(2)(B). The court found that Section 108(a) has been "routinely held to toll" statutes of limitation, but decided that section "cannot be applied" to toll Section 20(e)(2)(B) because Section 20(e)(2)(B) contains "jurisdictional" characteristics which are not found in traditional statutes of limitation. In the district court's view, the jurisdictional aspects of Section 20(e)(2)(B) create a conflict between the goals of the 1984 Shipping Act and the policies of the Bankruptcy Code as expressed in Section 108(a), with respect to which the goals of the former statute should prevail.

The sole issue presented for review by the United States Court of Appeals for the Ninth Circuit was whether Section 108(a) could be invoked to extend the time period fixed in 46 U.S.C. § 1719(e)(2)(B). On May 16, 1988, the Court of Appeals issued a one-paragraph order affirming the district court's judgment "substantially for the reasons stated in its opinion." (App. at A-2.)

REASONS FOR GRANTING THE WRIT

As the district court itself recognized, this case presents a question of first impression. The question has far-reaching consequences for those entities which seek protection under this nation's bankruptcy laws, for their creditors, and for those charged with administering bankruptcy estates. This Court is respectfully requested to determine the amount of deliberation a trustee or debtor-in-possession will be permitted after a bankruptcy petition is filed— in effect, to determine whether a trustee or debtor-in-possession may rely on the plain language of Section 108(a), carefully and responsibly sorting out the debtor's tangled business affairs, or must rush to file uninvestigated lawsuits to ensure that no cause of action is lost due to the nature of time provisions to which the action may be subject. That determination necessitates this Court's first in-depth examination of the nature and purpose of a statutory provision which has had, and will have, a significant impact on those seeking to rely upon Section 108(a) as a means of preserving the maximum amount of property in the bankruptcy estate.

The issue to be decided in this case—whether Section 108(a) may be invoked to extend the time limitation set forth in 46 U.S.C. § 1719(e)(2)(B)—goes to the heart of the policies and principles embodied in Section 108(a). Among the goals of the Bankruptcy Code is the preservation of the maximum amount of property and business opportunities for the bankruptcy estate. *See In re Santa Fe Development and Mortgage Corp.*, 16 B.R. 165, 168 (Bankr. 9th Cir. 1981) (construing 11 U.S.C. § 108(b)). The assets of the bankruptcy estate include causes of action. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983). Section 108(a) furthers the goal of the Bankruptcy Code of preserving such actions by extending the time to pursue them. *Natco Industries, Inc. v. Federal Insurance Company*, 69 B.R. 418, 419 (S.D.N.Y. 1987). As such, it should be liberally construed. *See In re Scheffler*, 21 F.Supp. 569, 571 (D.N.J. 1937).

The courts below, in finding that Section 108(a) may not be applied to the time limitation provisions contained in Section 20(e)(2)(B) of the 1984 Shipping Act, effectively established

that the former section may be applied to extend some time periods, but not others. That proposition flies in the face of the plain language of Section 108(a), and undermines the policies and purposes that provision is designed to achieve. It is also contrary to numerous decisions of both federal courts and the bankruptcy courts, which have consistently observed that a broad reading of Section 108(a) best effectuates these broad principles. For these reasons, this Court is respectfully requested to issue a writ of *certiorari*.

ARGUMENT

I.

THIS COURT SHOULD DECIDE THE SCOPE TO BE ACCORDED BANKRUPTCY CODE SECTION 108(a)

This Court is called upon to decide the breadth of the protections Congress conferred upon the bankruptcy estate in enacting Section 108(a). By its plain language, that provision admits to no limitation on the scope of the protection it provides. Rather, Section 108(a) purports to apply to all applicable nonbankruptcy law which "fixes a period" for commencing an action.

A. The Courts Below Failed To Recognize That Congress Sought To Preserve For An Extended Period All Causes Of Action The Bankrupt Could Have Pursued On The Date The Bankrupt Filed A Petition For Bankruptcy.

As this Court has admonished, the proper test for tolling a limitation period is not whether the time limitation is substantive or procedural, but whether tolling the limitation in a given context is consonant with the legislative scheme. *American Pipe and Construction Co. v. Utah,* 414 U.S. 538, 557 (1974). Here, tolling of all time periods fixed in applicable nonbankruptcy law is inherent in the legislative scheme.

One of Congress' major purposes in enacting the Bankruptcy Code was to maximize the property and business

opportunities of the bankruptcy estate for the benefit of creditors. To effect that purpose, the affairs of the debtor are supervised by the bankruptcy court, and placed in the hands of a trustee or debtor-in-possession, who is accountable to both the court and to a creditors' committee. This scheme assures that the debtor's assets will be wisely used and not squandered. Section 108(a) furthers this purpose by guaranteeing the bankruptcy trustee or debtor-in-possession additional time to assess the confused affairs of the bankrupt to decide which of the legal options available when the debtor filed for bankruptcy are worth pursuing.

The courts below, in characterizing Section 108(a) as simply a "grace period," and in refusing to apply that section to extend the period fixed in 46 U.S.C. §1719(e)(2)(B), clearly misinterpreted Congress' manifest purpose. "Nothing in the legislative history of [Section] 108 indicates a congressional intent that that section not apply to any and all relevant time periods within which the debtor and other interested parties find themselves." *In re Petersen,* 42 B.R. 39, 41 (Bankr. D.Or. 1984). *See also* 2 *Collier Bankruptcy Manual,* Ch. 108 (3d ed. 1985) (Section 108 is intended to be "broadly applicable, operating to establish new time limitations to replace all types of established periods which may bind a trustee or creditor"). Consistent with this intent, Section 108(a) and its predecessor, Section 11(e) (11 U.S.C. § 29(e)), have been applied by federal, state and bankruptcy courts alike to all manner of statutory time periods, including time limitations which were found to be provisions of substantive law. *See, e.g., Engstrom v. DeVos,* 81 F.Supp. 854 (E.D.Wash. 1949); *In re T.C.I. Ltd.,* 21 B.R. 876 (Bankr. N.D.Ill. 1982); *Levine v. Unruh,* 99 Ill.App.2d 94, 240 N.E.2d 521, 524 (1968). Contrary to the conclusion reached by the courts below, there is no relevant distinction between those provisions and the time limitation set forth in 46 U.S.C. §1719(e)(2)(B).

Accordingly, Section 108(a) allows the trustee or debtor-in-possession an extended period of time in which to take any action "as long as the debtor could have taken the action on the date the bankruptcy petition was filed." *In re Graham,* 24 B.R. 305, 313 (Bankr. N.D.Iowa 1982), *aff'd,* 726 F.2d 1268 (8th

Cir. 1984). *See also Sproul v. Gambone,* 34 F.Supp. 441, 443 (W.D.Pa. 1940) (90-day limitation of Pennsylvania statute "ceased to apply" from time bankruptcy petition was filed).

B. The Courts Below Did Not Recognize That The Application Of Section 108(a) To The One-Year Time Period Fixed In Section 20(e)(2)(B) Of The 1984 Shipping Act Is Consistent With Both The Provisions And The Policies Of The Act.

This Court has frequently expressed the well-established principle that when two statutes are capable of coexistence, it is the duty of courts to regard each as effective, absent a clearly expressed congressional intention to the contrary. *Morton v. Mancari,* 417 U.S. 535, 551 (1974). Congress, in enacting the broad language of Section 108(a), presumably was cognizant of the fact that the time extension provisions incorporated therein would extend time periods fixed in other legislation, including its own federal legislation. Obviously, in operating to extend such periods, and in every situation where it is applicable, Section 108(a) necessarily extends the time to do that which a state legislature or Congress has in some other provision of law decreed shall be foreclosed. Such is simply the nature of Congress' intent with respect to preserving the assets in the estate of the bankrupt.

The courts below, in declining to apply Section 108(a) to 46 U.S.C. § 1719(e)(2)(B), have completely misapprehended this statutory regime. Their perception of a conflict between the two Congressional acts studiously ignores the fact that Congress expressly provided a one-year time period in Section 20(e)(2)(B) within which a private maritime antitrust action may be brought, as well as a provision in the Bankruptcy Code which is clearly designed to interdict such periods. As a result, the courts below effectively read Section 108(a) out of existence. Not only is this contrary to their duty under *Morton v. Mancari,* it is illogical. Indeed, under the interpretation given to Section 108(a) by the courts below, a "conflict" would exist every time the protection of Section 108(a) is sought. Such an interpretation demonstrates a fundamental misunderstanding of the proper function and application of Section 108(a).

C. The Courts Below Utterly Failed To Recognize The Exigencies Of Bankruptcy Which Spurred Congress To Enact The Time Extension Provisions Incorporated In Section 108(a).

Congress, in enacting Section 108(a), was clearly aware of the difficulties and hardships that arise during bankruptcy. In order to bring suit, for example, the trustee or debtor-in-possession may need to satisfy the creditors' committee and/or the bankruptcy court that such a suit is both warranted and meritorious, and not simply a waste of time and money. Obviously, this can be a lengthy process. Moreover, if a contemplated lawsuit is complex or beyond the expertise of the debtor's bankruptcy or business counsel, outside counsel must be retained to handle the litigation. This too can be a time-consuming task if the bankruptcy estate has limited funds with which to pay legal fees. Section 108(a) recognizes these realities, and provides the additional time that is needed under such circumstances.

The courts below utterly failed to comprehend the exigencies of bankruptcy which led Congress to enact Section 108(a). The district court's order granting the motion to dismiss devotes four full pages to a discussion of the goals of the 1984 Shipping Act, and less than one page to the goals of the bankruptcy laws. Even from this scant treatment of the latter statutes, however, it is apparent that the court did not fully appreciate the policies embedded in the bankruptcy laws. For example, the court stated that it was "unwilling to construe the [Shipping] Act in such fashion that its jurisdictional limits apply to viable shipping firms but not to bankrupt shipping firms." It also failed to distinguish between a debtor-in-possession, who may invoke Section 108(a) (*see In re Ernest & Associates, Inc.*, 59 B.R. 495, 498 (Bankr. W.D.Tex. 1985)), and a debtor, who may not (*see Natco Industries, Inc. v. Federal Insurance Company*, 69 B.R. 418, 419-20 (S.D.N.Y. 1987)). These examples demonstrate the district court's total failure to realize that Section 108(a) is intended not to protect the debtor, but the debtor's estate and creditors, and indicate that the court considered Section 108(a) little more than a mere "grace period."

II.

THE DECISIONS OF THE COURTS BELOW, IF NOT REVERSED, WILL GREATLY HINDER EFFORTS TO PROTECT THE RIGHTS OF BANKRUPTS AND CREDITORS, AND WILL RESULT IN A FLOOD OF COSTLY AND NONMERITORIOUS LAWSUITS TO ENSURE THAT SUCH RIGHTS ARE NOT FORFEITED

In Bankruptcy Code Section 108(a), Congress sought to provide trustees and debtors-in-possession with a reasonable amount of time in which to sort through the affairs of the bankrupt, which are usually in turmoil due to the exigencies of bankruptcy, and to decide: (1) whether a bankrupt has potential causes of action; (2) whether the causes of action are meritorious; (3) whether they are worth pursuing; and (4) whether they should be pursued by litigation rather than other means. By reducing the pressure of time deadlines, Section 108(a) results in fewer nonmeritorious claims being filed by hurried trustees or debtors-in-possession seeking to ensure that no potential claim is forfeited. These benefits flow from the expectations engendered by Section 108(a) which, by its plain language, sets forth a single, uniform time period for filing all actions that were available to the debtor. In short, what makes Section 108(a) effective is the perception by trustees and debtors-in-possession that they can rely on it to preserve debtors' and creditors' rights.

The decisions of the courts below stand this well-ordered and sensible scheme on its head. Trustees and debtors-in-possession will no longer be able to rely on Section 108(a) to protect the bankruptcy estate. Instead, they will now be required to immediately undertake an onerous, time-consuming and expensive analysis to determine whether there is any obscure time limit applicable to one or more of the bankruptcy estate's potential claims which may not be extended by Section 108(a), and/or file every claim the estate may conceivably have before undertaking a thorough investigation and considered approach to ascertain whether there is any merit to such

claims. Not only is there the potential to waste the time and resources of the bankrupt and the trustee, but the court in which the actions are filed, the litigants in that court, the bankruptcy court which may have to approve the filings, and the creditors who may support or oppose litigation.

Moreover, trustees and debtors-in-possession will be hindered in their other efforts to protect the rights of the debtor and creditors, for the prosecution of claims against third parties is only one of the many functions with which they are charged. Obviously, in addition to pursuing legal claims, trustees and debtors-in-possession must deal with creditors, both secured and unsecured, who seek to reclaim that which they have provided to the bankrupt or to tie up the assets of the estate to satisfy their claims, as well as with those who owe money to the debtor but use the bankruptcy as an excuse for nonpayment. For example, if secured creditors object to the use of cash in the estate which is collateral for their loans, approval of the bankruptcy court must be sought to permit the trustee or debtor-in-possession to use the money on behalf of the estate. By diverting the trustee or debtor-in-possession from these and myriad other duties, the decision below will have a significant, unnecessary and unfavorable impact on the role of the trustee or debtor-in-possession, and all the assets of the bankruptcy estate. Simply stated, the refusal to apply Section 108(a) in this case has created a situation in which a trustee or debtor-in-possession is placed in the untenable position Congress sought to avoid.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of *certiorari*.

Dated: August 11, 1988

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAWINDS, LTD.,
Plaintiff-Appellant,

v.

NEDLLOYD LINES, B.V.; ROYAL NEDLLOYD GROUP, N.V.; KNSM LINES, B.V.; AMERICAN PRESIDENT COMPANIES, LTD.; AMERICAN PRESIDENT LINES, LTD.; SEA-LAND CORPORATION; SEA-LAND SERVICE, INC.; DAMPSKIBSSELSKABET AF 1912 A/S; A/S DAMPSKIBSSELSKABET SVENDBORG; A.P MOLLER-MAERSK LINE; HAPAG-LLOYD AKTIENGESELLSCHAFT; INTERCONTINENTAL TRANSPORT (ICT) B.V.
Defendants-Appellees.

No. 87-2363

D.C.No. CV 86-2409-DLJ

ORDER

Appeal from the United States District Court for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued and Submitted
April 14, 1988—San Francisco, California

Filed May 16, 1988

Before: Alfred T. Goodwin, Mary M. Schroeder and Cecil F. Poole, Circuit Judges.

COUNSEL

Thomas R. Fahrner, Furth, Fahrner, Bluemle and Mason, San Francisco, California for the plaintiff-appellant.

M. Laurence Popofsky, Heller, Ehrman, White and McAuliffe, San Francisco, California for the defendant-appellee Nedlloyd Lines.

Terry M. Gordon, Lasky, Haas, Cohler and Munter, San Francisco, California for the defendant-appellee Sea-Land.

ORDER

The judgment of the district court is affirmed substantially for the reasons stated in its opinion. *See Seawinds Ltd. v. Nedlloyd Lines, B.V.*, 80 Bankr. 181 (N.D.Cal. 1987).

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEAWINDS, LTD.,
Plaintiff-Appellant,

vs.

NEDLLOYD LINES, B.V.; ROYAL NEDLLOYD GROUP, N.V.; KNSM LINES, B.V.; AMERICAN PRESIDENT COMPANIES, LTD.; AMERICAL PRESIDENT LINES, LTD.; SEA-LAND CORPORATION; SEA-LAND SERVICE, INC.; DAMPSKIBSSELSKABET SVENDBORG; A.P. MOLLER-MAERSK LINE; HAPAG-LLOYD AKTIENGESELLSCHAFT; INTERCONTINENTAL TRANSPORT (ICT) B.V.,
Defendants-Appellees.

CA NO. 87-2363

DC NO. CV-86-2409-DLJ

APPEAL from the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered: May 16, 1988

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SEAWINDS LIMITED,

Plaintiff,

v.

NEDLLOYD LINES, B.V.; ROYAL NEDLLOYD GROUP, N.V.; KNSM LINES, B.V.; AMERICAN PRESIDENT COMPANIES, LTD.; AMERICAN PRESIDENT LINES, LTD.; SEA-LAND CORPORATION; SEA-LAND SERVICE, INC.; DAMPSKIBSSELSKABET AF 1912 A/S; A/S DAMPSKIBSSELSKABET SVENBORG; A.P. MOLLER-MAERSK LINE; HAPAG-LLOYD AKTIENGESELLSCHAFT; AND INTERCONTINENTAL TRANSPORT (ICT) B.V.,

Defendants.

NO. C-86-2409 DLJ

ORDER GRANTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

On November 5, 1986 this Court heard oral argument on defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted, Fed.R.Civ.P. 12(b)(1) & (6). All parties appeared through their respective counsel. Because the motion raises a question of first impression — application of section 108(a) of the Bankruptcy Code, 11 U.S.C. §108(a), to the "savings provisions" of the Shipping Act of 1984, 46 U.S.C. §§1701-1720—the Court requested supplemental briefing. The parties have filed their supplemental memoranda, and the Court has considered carefully all materials submitted, as well as the parties' arguments advanced at the hearing. For the

reasons set forth below, the Court is persuaded that the policies embodied in the Shipping Act mandate dismissal of this action.

I. FACTS.

Plaintiff Seawinds Limited ("Seawinds") bases this private maritime antitrust action on an alleged conspiracy to drive it out of the transpacific container shipping business. Seawinds, incorporated in Hong Kong in late 1982, engaged in the transpacific container shipping business between April 1983 and October 1984. On October 22, 1984 plaintiff filed a petition in the Northern District of California for Chapter 11 bankruptcy. Subsequently, on May 9, 1986, it commenced this action, alleging that defendants, in conjunction with various non-defendants, conspired to put it out of business.

The defendants may be classified in two groups. The "Nedlloyd defendants" consist of three Netherlands corporations: Nedlloyd Lines, B.V. ("Nedlloyd"), the Royal Nedlloyd Group, N.V. ("Nedlloyd Group"), and KNSM Lines, B.V. ("KNSM"). The nine "non-Nedlloyd defendants" consist of four American corporations, American President Companies, Ltd. ("APC"), American President Lines, Ltd. ("APL"), Sea-Land Corporation ("SLC"), and Sea-Land Service, Inc. ("SLS"); three Danish corporations, Dampskibsselskabet AF 1912 A/S, A/S Dampskibsselskabet Svenborg, and A.P. Moller-Maersk Line; one German corporation, Hapag-Lloyd Aktiengesellschaft; and one Netherlands corporation, Intercontinental Transport (ICT) B.V. ("ICT"). With the possible exception of ICT, all the non-Nedlloyd defendants appear to be involved in the transpacific container shipping business.

The complaint alleges federal antitrust and pendent state law claims. In brief, Seawinds alleges that defendants and others conspired to drive it out of the transpacific container shipping market by fixing reduced tariff rates, inducing suppliers and potential customers to boycott plaintiff, engaging in unfair practices, and breaching fiduciary duties. Counts One through Three allege violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2, for which plaintiff seeks

damages under 15 U.S.C. §15. The remaining four counts allege pendent state claims for breach of contract, breach of fiduciary duty, conspiracy to violate fiduciary duties, and tortious interference with contractual relations to drive plaintiff out of business. All seven counts are based on a common core of charging allegations, which recount conduct occurring between late 1982 and March 15, 1984.[1]

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of subject matter jurisdiction and failure to state a claim. Defendants submit that the challenged conduct falls within the purview of the Shipping Act of 1984, 46 U.S.C. §§1701-1720 ("the Act"), which abolished private antitrust actions for conduct prohibited by the Act, and instead vested in the Federal Maritime Commission exclusive jurisdiction over damage claims based on such conduct. They contend that because Seawinds' claims are covered by the Act, the Court is without jurisdiction over this action. Nor, they argue, does the action fall within the narrow, one-time exception embodied in the Act's "savings provisions."

Seawinds, on the other hand, contends that the 1984 Act does not even apply to its claims because they rest upon conduct occurring prior to the statute's date of enactment, March 20, 1984. Alternatively, even if the Act applies, plaintiff argues, this action is "saved" from the Act's substantive provisions because it was filed within the exemption period set forth in 46 U.S.C. §1719(e)(2)(B), as "boosted" by Bankruptcy Code §108(a), which extends by two years the point at which a bankrupt debtor's cause of action would otherwise have expired. Under plaintiff's analysis, this private antitrust suit is specifically exempted by the terms of the Act, as read in conjunction with the applicable provision of the Bankruptcy Code.

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[1] Complaint ¶¶ 19-23, 42, 54, 61, 67. As to the state claims, however, plaintiff alleges conduct extending beyond the March 15, 1984 date. *See* Complaint ¶¶ 49, 50, 56, 64, 72.

II. DISCUSSION.

The parties thus raise two issues: the applicability of the 1984 Shipping Act to pre-Act conduct, and the applicability of section 108(a) of the Bankruptcy Code to the savings provisions of the 1984 Shipping Act. The Court takes up each issue in turn. First, however, it is useful to set forth the relevant provisions of the Act, as well as excerpts from its legislative history.

A. The Shipping Act of 1984.

The 1984 Act, enacted on March 20, 1984 as Public Law 98-237 (98 Stat. 67), effected various changes in the law of international ocean commerce while carrying forward several provisions of the otherwise repealed Shipping Act of 1916, 46 U.S.C. § 801 *et seq.* *See Compagnie Generale Maritime v. S.E.L. Maduro (Florida), Inc.*, 23 S.R.R. 1085, 1087 & n.5 (ALJ Opn. FMC 1986). Of particular note here are changes pertaining to maritime antitrust claims.

The Shipping Act of 1984 expressly bars private antitrust suits based on conduct prohibited by the Act. Section 7(c)(2) of the Act provides:

> No person may recover damages under section 15 of Title 15, or obtain injunctive relief under section 26 of Title 15, for conduct prohibited by this chapter.

46 U.S.C. § 1706(c)(2). Prohibited acts are enumerated in 46 U.S.C. § 1709. In place of private antitrust actions the Act establishes an administrative complaint process before the Federal Maritime Commission ("FMC"). "Any person" may file a sworn complaint with the FMC to obtain reparation for injuries caused by violations of the Act. 46 U.S.C. § 1710(a). There is a three-year statute of limitation for such complaints. *Id.* §1710(g). The FMC is authorized to award actual damages (and, in appropriate circumstances, double damages) as well as attorney's fees. *Id.* Injunctive relief is available to either the Commission or the complainant. *Id.* § 1710(h).

The Act does not impose an absolute bar on private maritime antitrust actions as of the date of enactment. Rather,

it contains "savings provisions" which limit application of the Act with respect to certain pending and accrued causes of action. Section 20(c)(2) provides:

> This Act and the amendments made by it shall not affect any suit—
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> (A) filed before March 20, 1984; or
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> (B) with respect to claims arising out of conduct engaged in before March 20, 1984, filed within 1 year after March 20, 1984.

46 U.S.C. § 1719(e)(2).

These substantive provisions must be understood in the context of the Act's legislative history. Among the major purposes to be accomplished by the Shipping Act of 1984 were clarification of antitrust immunity for international ocean carriers, vesting in the Federal Maritime Commission of exclusive jurisdiction over administration of the Shipping Act's provisions, and minimizing government involvement in regulation of shipping operations. *See* Report of the House Committee on Merchant Marine and Fisheries, H.R. Rep. No. 53 (I), 98th Cong., 1st Sess. 3-4, *reprinted in* 1984 U.S. Code Cong. & Ad. News 167, 168-69 [hereafter "Report (I)"].

The Shipping Act of 1984 was intended to clarify and broaden the antitrust immunity provided by the previous Shipping Act of 1916. That statute had established the United States Shipping Board (predecessor of the FMC) to regulate the ocean shipping industry, setting out a comprehensive regulatory scheme and granting limited immunity to ocean shipping lines. *See* 46 U.S.C. § 800 *et seq.* In the following years judicial interpretations narrowed the scope of this antitrust immunity and created parallel jurisdiction between the regulatory agency and the federal courts in certain cases. *See, e.g., Sabre Shipping Corp. v. American President Lines, Ltd.,* 285 F.Supp. 949 (S.D.N.Y. 1968), *aff'd on other grounds sub nomine Japan Line Ltd. v. Sabre Shipping Corp.,* 407 F.2d 173 (2d Cir.), *cert. denied,* 395 U.S. 922 (1969).

Congress evinced growing concern with the "regulatory uncertainty" attendant on the courts' assumption of parallel jurisdiction over the subject matter of the 1916 Act. The Shipping Act of 1984 was designed in part to clarify the remedies available and the proper forum for pursuing them. Thus, the legislative history to the Act reflects Congress's intent that the "remedies and sanctions provided in the Shipping Act of [1984] will be the exclusive remedies and sanctions for violation of the act." Report (I), *supra,* at 12, 177; *see also* Letter of Secretary of Transportation Drew Lewis, *reprinted in* Report (I), *supra,* at 45, 210. With the Act, Congress removed the private right of action for antitrust violations based on conduct prohibited in the Act. 46 U.S.C. §§ 1706(c)(2), 1710(a). In order to counterbalance the elimination of the deterrent force of antitrust laws, however, Congress empowered the FMC to order reparations up to double actual damages, and provided a range of sanctions and penalties for prohibited conduct. *See* Report (I), *supra,* at 19, 184. As the House Report stated, "the FMC is provided exclusive jurisdiction in administering all of the provisions of the Shipping Act as they relate to international liner shipping regulations." *Id.* at 3, 168.

The Committee on Merchant Marine and Fisheries, which reported out the bill, stated its confidence that it had achieved the Administration's expressed objective of ensuring that

> members of the ocean liner industry should be free to conduct their business as they see fit, free of government intervention in the form of unnecessary regulations, vague standards, or threatened penalties under changing interpretations of antitrust laws.

Report (I), *supra,* at 25, 190.

It thus appears that Congress intended to clarify shippers' potential liability for conduct previously covered by the antitrust laws, to restrict remedies and sanctions therefor to those enumerated in the 1984 Act, and to vest exclusive jurisdiction in the FMC for the oversight of this remedial scheme. By limiting jurisdiction to the FMC, and restricting that Commission's regulatory scope, Congress implemented the goal of reducing government involvement in shipping operations. By removing

the courts from this regulatory process, Congress removed the potential for continuing regulatory uncertainty.

B. Applicability of the 1984 Act to Pre-Act Conduct.

Seawinds contends at the outset that the 1984 Act does not even apply to this action, which challenges only pre-Act conduct. Plaintiff notes that the Act provides that "[n]o person may recover damages [under federal antitrust laws] . . . for conduct prohibited by this chapter." 46 U.S.C. § 1706(c)(2). But since "this chapter" (i.e., 46 U.S.C. § 1701 *et seq.*) did not prohibit defendants' conduct at the time it occurred, Seawinds urges, the Act is by its own terms inapplicable.[2] Perhaps supporting plaintiff's position is the remark of one district court that "[t]he Act applies only to conduct occurring after March 20,1984." *Johnson Products Co. v. M/V La Molinera,* 619 F.Supp. 764, 766 (S.D.N.Y. 1985).[3]

Although plaintiff's syllogism is at first blush appealing, it ignores the plain language of the statute. If the 1984 Act did not apply at all to pre-Act conduct, the provision of § 1719(e)(2)(B)—that suits "arising out of conduct engaged in before March 20, 1984" are exempt from the Act's substantive provisions if "filed within one year after March 20, 1984"—would be mere surplusage. It is of course a cardinal rule of statutory construction that a court must avoid inter-

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[2] The parties do not argue, and this Court does not decide, whether the 1984 Act retroactively imposes new standards of conduct or severer penalties, in the manner of an *ex post facto* law. Plaintiff alleges conduct violating sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Defendants argue that this conduct is proscribed by various sections of the 1984 Act. *See* Defendants' Joint Memorandum of Points and Authorities in Support of Motion to Dismiss 7-9. Far from objecting to application of the new statute, defendants assert that it controls this action.

[3] In *Johnson Products* the district court dismissed plaintiff's Shipping Act claim for failure to state a claim because the allegations of fraud and negligence did not fall within the substantive provisions of either the 1916 Shipping Act or its 1984 replacement. *Johnson Products,* 619 F.Supp. at 766. The court's remark that the 1984 Act applies "only to conduct occurring after March 20, 1984" was thus only a dictum. The court's statement may be intended to reflect the fact that the complaint before it, which was filed in January 1985, arguably qualified under the saving provision of § 1719(e)(2)(B). Most importantly, the statement is set forth without analysis. For the reasons discussed in the text below, the Court declines to follow the *Johnson Products* dictum.

preting a statute in such a way as to render any of its language meaningless. *See, e.g., Yamaguchi v. State Farm Mutual Automobile Ins. Co.,* 706 F.2d 940, 947 (9th Cir. 1983); *United States v. Mehrmanesh,* 689 F.2d 822, 829 (9th Cir. 1982). The Court thus rejects plaintiff's interpretation, which would render meaningless the one-year "grace period" specified in subsection (e)(2)(B).

The evolution of the savings provision, section 1719(e)(2), buttresses this conclusion. The legislative history evinces concern with preserving pre-existing rights of action. The report of the House Committee on Merchant Marine and Fisheries expressed an intent to preserve all *pending* private antitrust lawsuits from the bar of the new Act. The report stated that this savings provision of subsection (e)(2)

> was intended to preserve the rights of parties to lawsuits that are filed before the date of enactment. Since section 7(a)(7) of the bill [46 U.S.C. § 1706(a)(6)] makes the antitrust law inapplicable to any agreement, modification, or cancellation that was approved by the Federal Maritime Commission under present law, there were some who thought this would adversely affect pending lawsuits. The intent of this savings provision is to permit such suits to continue to conclusion as if the legislation were never enacted.

Report (I), *supra,* at 39, 204. This concern evidently lay behind the language of 46 U.S.C. § 1719(e)(2)(A), which provides that the substantive provisions of the Act shall not affect any suit filed before March 20, 1984.[4]

[4] In fact, the restriction of § 1719(e)(2) to "suits" itself represented a narrowing of the exemptions provided by an earlier version of the 1984 Act, S. 1460, which would have exempted from the new Shipping Act "any rights and duties that matured, penalties that were incurred or proceedings that were commenced before the date of enactment of this Act." *See California Cartage Co. v. Pacific Maritime Assn.,* 23 S.R.R. 420, 423-24 (FMC 1985), *aff'd,* 802 F.2d 353 (9th Cir. 1986).

The House Committee on the Judiciary, however, intended a broader range of exemptions. The Judiciary Committee reported that it had added language to subsection (e)(2) "to make clear that, with respect to conduct occurring before the date of enactment of this bill, all remedies available at the time of the conduct will remain available after enactment." Report of the House Committee on the Judiciary, H.R. Rep. No. 53 (II), 98th Cong., 1st Sess. 36, *reprinted in* 1984 U.S. Code Cong. & Ad. News 221, 256 [hereafter "Report (II)"]. The Committee explained:

> This change was made in response to testimony expressing concern that the operation of section 7(a)(7) [now providing antitrust immunity under 46 U.S.C. § 1706(a)(6)] could lead to denying persons injured under existing agreements the relief available under the law in effect at the time the conduct occurred. Section 7(a)(7) will alter the rights and remedies of the parties only with respect to conduct occurring after the date of enactment.

Id.

Significantly, the Judiciary Committee did not then have before it the version of the savings provisions which was ultimately enacted into law. Congress subsequently added the final phrase of subsection (e)(2)(B), cutting back the scope of exemption for suits based on conduct occurring before March 20, 1984. In place of the earlier exemption of all suits arising out of pre-Act conduct, the Act in its final form saves only those suits either filed before its enactment or arising out of pre-Act conduct *and* filed within one year after the date of enactment. 46 U.S.C. § 1719(e)(2)(A), (B). It thus appears that the legislative process finally produced a compromise with respect to subsection (e)(2)(B). Under this provision, private antitrust claims based on conduct occurring before enactment of the 1984 Act would remain unaffected — provided the actions were filed within a year after enactment of the 1984 Act.

Finally, the Court notes that the FMC has applied provisions of the Shipping Act of 1984 to agency complaints based on pre-Act conduct, consistent with the "manifest injustice" rule

of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).[5] *See, e.g., California Cartage Co. v. Pacific Maritime Assn.*, 23 S.R.R. 420 (FMC 1985) (1984 Act applied to pre-Act conduct; new law eliminated both substantive cause of action and standing to claim invalidation of assessment agreement), *aff'd sub nomine California Cartage Co. v. United States*, 802 F.2d 353 (9th Cir. 1986); *A & A International v. Kawasaki Kisen Kaisha, Ltd.*, 23 S.R.R. 1174 (FMC 1986) (1984 Act's three-year statute of limitation, rather than 1916 Act's two-year period, applied to complaint filed under 1984 Act on basis of 1983 conduct); *Compagnie Generale Maritime v. S.E.L. Maduro (Florida), Inc., supra* (1984 Act's statute of limitation applied to conduct allegedly violating both 1984 and 1916 Acts). The FMC's interpretation of the 1984 Act, which merits "considerable deference," *California Cartage Co., supra*, 802 F.2d at 357, further persuades the Court that plaintiff errs in proposing that the 1984 Act cannot apply to pre-enactment conduct such as that alleged in its complaint.

C. Bankruptcy Code Section 108(a).

Seawinds argues that even if the 1984 Act applies, section 108(a) of the Bankruptcy Code, 11 U.S.C. § 108(a), operates to extend the filing period set forth in the savings provision of the 1984 Act, thereby exempting this action from the Act's substantive provisions.

Title 11 U.S.C. section 108(a) provides:

> If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period

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[5] A court is to apply the law in effect at the time it renders its decision, unless to do so would result in "manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). A determination of manifest injustice rests on three considerations: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.* at 717; *see also Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

The FMC has determined that the applicability of the 1984 Act under the *Bradley* criteria is to be decided on a case-by-case basis under the facts of a given proceeding. *See Notice: Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 49 Fed. Reg. 21,798 (1984), 22 S.R.R. 976 (1984).

> within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of—
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> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
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> (2) two years after the order for relief.

Section 108(a) thus establishes three requirements. First, the applicable nonbankruptcy law must "fix a period within which the debtor may commence" the action. Second, the debtor must file for bankruptcy before expiration of that period. Finally, the debtor must commence the action before expiration of the extension period. This statute applies to debtors as well as trustees. *In re Santa Fe Development and Mortgage Corp.*, 16 Bankr. 165, 167 n.1 (Bankr. 9th Cir. 1981); *In re T.C.I., Ltd.*, 21 Bankr. 876, 878 (Bankr. N.D. Ill. 1982); *see also* 11 U.S.C. § 1107(a) ("[A] debtor in possession shall have all the rights . . . and powers . . . of a trustee serving in a case under this chapter."). Since the filing of the petition for bankruptcy constitutes entry of an "order for relief" within the meaning of the statute, *In re Glenn*, 760 F.2d 1428, 1437 n.6 (6th Cir.), *cert. denied sub nomine Miller v. First Federal of Michigan*, ____ U.S. ____, 106 S.Ct. 144 (1985), section 108(a) provides a "tolling period" of at least two years after the plaintiff-debtor files a petition for bankruptcy.

Section 108(a) and its predecessor, section 11(e) of the Bankruptcy Code, have been held to "preserve and extend" a debtor's right of action beyond the time when it would otherwise have expired. In *Engstrom v. De Vos*, 81 F.Supp. 854 (E.D. Wash. 1949), the court construed section 11(e) to preserve the trustee's right to recover an alleged unlawful preference. The trustee sued under a state statute which allowed recovery of a preference made by an insolvent corporation. The statute limited the right of action, however, by requiring that the preference occur within four months of the date of application for appointment of the trustee, and that the action be commenced within six months thereafter. The court

found that section 11(e) superseded these limitations. The court stated that section 11(e) was an exercise of Congress's broad power, in the field of bankruptcy, to alter both procedural and substantive rights. The court found that the trustee's right of action came into existence upon his application for appointment and continued under the statute for six months, at which time it would normally have expired. However, section 11(e) preserved and extended it for two years subsequent to adjudication of the debtor's status as bankrupt. *De Vos*, 81 F.Supp. at 859.

The *De Vos* rationale has been applied to section 108(a) of the Bankruptcy Code. *See In re T.C.I., Ltd., supra*, 21 Bankr. at 879 (section 108(a) held to toll statutory time periods "even if the time periods constitute a condition precedent to asserting a cause of action").

Relying on these and other cases,[6] plaintiff argues that the savings provision of the Shipping Act of 1984, 46 U.S.C.

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[6] The parties have cited the Court to numerous cases construing section 108 of the Bankruptcy Code. These cases demonstrate a clear trend of applying section 108(a) to toll statutes of limitation in appropriate circumstances. None of these cases holds that section 108(a) operates to extend *jurisdictional* limitations. *See, e.g., In re Greenwald*, 48 Bankr. 263, 273 (S.D.N.Y. 1984) (state statute of limitation bar under Virginia law); *In re L.A. Clarke & Sons, Inc.*, 59 Bankr. 856, 857 (Bankr. D.D.C. 1986) (no statute of limitation bar under Virginia law); *In re Jackson*, 42 Bankr. 76, 84 (Bankr. D.D.C. 1984) (state law usury claim not time-barred); *In re Ward*, 42 Bankr. 946, 950 (Bankr. M.D. Tenn. 1984) (§ 108(a) extension inapplicable to extend limitation period for enforcement of judgment lien because cause of action unrelated to debtor's claim); *Matter of Lauderdale Motorcar Corp.*, 35 Bankr. 544, 549-50 (Bankr. S.D. Fla. 1983) (§ 108(a) inapplicable because right to protest non-renewal of dealer agreement not an "action" within meaning of statute; dictum that debtor's failure to protest non-renewal within 90 days left state agency without jurisdiction to act); *In re Radcliffe's Warehouse Sales, Inc.*, 31 Bankr. 827, 830-32 (Bankr. W.D. Wash. 1983) (§ 108(a) unavailable to extend state statute of limitation in action by trustee based on creditors' rights); *In re Reliable Drywall, Inc.*, 20 Bankr. 386, 387 (Bankr. D. Ariz. 1982) (§ 108(a) extends statute of limitation in action to foreclose on property encumbered by debtor's mechanic's lien).

The legislative history of section 108(a) suggests that Congress viewed the statute as establishing a limited tolling of statutes of limitation for causes of action belonging to the bankruptcy estate. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 318, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6275 ("Subsection (a) extends any statute of limitation for commencing or continuing an action by the debtor . . . .").

§ 1719(e)(2)(B), "created" a right to file private antitrust actions in derogation of the otherwise applicable prohibition against such actions in 46 U.S.C. § 1706(c)(2); that this right "continued to exist" for one year; and that it would normally have expired at that time, except that section 108(a) of the Bankruptcy Code preserved and extended it for the period of two years. Seawinds argues that it has met the three requirements for application of section 108(a) in that it filed for bankruptcy on October 22, 1984 and commenced this action on May 9, 1986.

The parties dispute whether the savings provision of the 1984 Act constitutes a statute of limitation of the type section 108(a) is routinely held to toll, or a jurisdictional provision to which section 108(a) cannot be applied.[7] The question is not an easy one to answer.

It has been held that

> [t]he purpose of a Savings Clause, unlike a Statute of Limitations . . . is not to cut off stale claims. Rather, the Savings Clause is designed to avoid the disruption of ongoing deliberations that would be caused by a change in the applicable law.

Wilson v. Turnage, 750 F.2d 1086, 1091 (D.C. Cir. 1984), *vacated on other grounds*, 755 F.2d 967 (D.C. Cir. 1985). Here, of course, the 1984 Shipping Act changes applicable law by vesting exclusive jurisdiction of certain private antitrust claims with the FMC. From one perspective the Act's savings provisions might be deemed to provide an orderly transition from the old statutory scheme to the new; thus, as pointed out in *Turnage, supra*, all pending lawsuits are exempted from the Act's substantive provisions. Then, too, it is significant that the

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[7] While the parties agree that section 108(a) can, in appropriate circumstances, operate to extend a statute of limitation in favor of the estate, they dispute whether it is similarly applicable to a jurisdictional provision. Plaintiff does not offer, and the Court has not found, authority for the latter proposition. *See supra* note 6. The Court declines to create such a rule in the context of this case, involving as it does construction of a statute whose legislative history reveals a clear congressional concern with divesting federal courts of parallel jurisdiction over maritime antitrust matters.

1984 Act contains an express statute of limitation. 46 U.S.C. § 1710(g). But the savings provisions do not affect only "ongoing deliberations." They also exempt all actions filed within one year of the date of enactment. To this extent, the savings provisions can be said to "fix a period" within which a party may commence an action to vindicate its claims or forever lose them. The savings provisions of the Shipping Act of 1984 thus appear to share characteristics of both the jurisdictional savings provision and the traditional statute of limitation.

The Court turns for guidance to the policy considerations underlying the conflicting statutes relied upon by the parties. The legislative history of the 1984 Act, set forth at some length in Part IIA above, reveals an overriding purpose to vest exclusive jurisdiction over maritime antitrust remedies with the FMC. Avoiding parallel litigation in the courts and before the agency, with its ensuing threat of regulatory uncertainty, was of paramount concern.

The purpose of section 108(a) of the Bankruptcy Code, on the other hand, is to give the trustee or debtor sufficient time to decide whether to start a lawsuit. "The debtor is granted a grace period to determine whether his rights, which might be unknown on the Filing Date, are worth pursuing in the courts." *Matter of Lauderdale Motorcar Corp., supra,* 35 Bankr. at 549. A broad reading of this provision furthers the bankruptcy goals of preserving the maximum amount of property and business opportunities for the estate. *See In re Santa Fe Development and Mortgage Corp., supra,* 16 Bankr. at 168 (construing § 108(b)). Section 108(a) thus furthers the bankruptcy policy of preserving assets of the estate, including a debtor's causes of action, *see* 11 U.S.C. § 541(a)(1), which may be affected by statutes of limitation.

Upon considering the relative degrees to which these policies are implicated in the circumstances of this case, the Court is persuaded that those embodied in the savings provisions of the 1984 Shipping Act should prevail. The Court simply cannot reconcile plaintiff's claims with the clear expression of Congress's intent to divest the courts of jurisdiction

over federal maritime antitrust actions filed after the one-year period specified in 46 U.S.C. § 1719(e)(2)(B).

The jurisdictional impact of the 1984 Act is evident, and it is precisely this aspect of the statute that counsels against applying Bankruptcy Code section 108(a) to the savings provision of section 1719(e)(2)(B). An express savings clause represents a limited exception to the general rule that a court must apply the law in effect at the time it renders its decision. Where Congress withdraws jurisdiction from the courts, a savings provision will be strictly construed:

> When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. . . . If the aim is to destroy a tribunal or take away cases from it, there is no basis for finding saving exceptions unless they are made explicit.

De La Rama SS. Co. v. United States, 344 U.S. 386, 390 (1953); *see also Hallowell v. Commons*, 239 U.S. 506 (1916). Because the effect of the 1984 Shipping Act appears closer to a jurisdictional repeal than it does to the repeal of a statute that simply creates rights and prescribes the manner of their vindication, *De La Rama S.S. Co.*, 344 U.S. at 390, the Court is unwilling to imply by judicial fiat what Congress has not expressly provided.

Here, the savings provision sets a clear limit on the exemption from its prohibition of private antitrust suits. There is no indication that Congress intended a further extension of that exemption for bankrupt debtors. In the face of the clear statutory language and unmistakeable legislative purpose, the Court is unwilling to construe the Act in such fashion that its jurisdictional limits apply to viable shipping firms but not to bankrupt shipping firms.

The clear jurisdictional purpose underlying the Act convinces the Court that this is not an appropriate case for application of section 108(a).

III. CONCLUSION.

The Court finds that the Shipping Act of 1984 is not per se inapplicable to this case because of the fact that plaintiff alleges conduct occurring prior to the date of enactment of the Act. The Court thus applies the Act's jurisdictional provisions barring private antitrust actions, subject only to a limited saving of those actions filed prior to enactment or based on pre-Act conduct and filed on or before March 20, 1985. Because of the jurisdictional nature of those provisions, the Court declines to apply section 108(a) to extend the filing period available to Seawinds for commencement of this antitrust action. Inasmuch as this action was not filed until May 9, 1986, more than one year beyond the savings period established in 46 U.S.C. § 1719(e)(2)(B), holds that this action must be dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATED: June 24, 1987

D. Lowell Jensen
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SEAWINDS LIMITED,

Plaintiff,

v.

NEDLLOYD LINES, B.V.; ROYAL NEDLLOYD GROUP, N.V.; KNSM LINES, B.V.; AMERICAN PRESIDENT COMPANIES, LTD.; AMERICAN PRESIDENT LINES, LTD.; SEA-LAND CORPORATION; SEA-LAND SERVICE, INC.; DAMPSKIBSSELSKABET AF 1912 A/S; A/S DAMPSKIBSSELSKABET SVENBORG; A.P. MOLLER-MAERSK LINE; HAPAG-LLOYD AKTIEN-GESELLSCHAFT; and INTERCONTINENTAL TRANSPORT (ICT) B.V.,

Defendants.

NO. C-86-2409 DLJ

JUDGMENT

JUDGMENT

For the reasons set forth in this Court's Order Granting Motion to Dismiss, signed and filed on this same date, the Court hereby enters judgment for defendants and against plaintiff.

DATED: June 24, 1987

D. Lowell Jensen
United States District Judge

ENTERED IN CIVIL DOCKET 6-25-87

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.:

THOMAS R. FAHRNER, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and am one of the attorneys for petitioner in *Seawinds Limited v. Nedlloyd Lines, B.V., et al.*

2. On August 12, 1988, I caused three (3) copies of petitioner's "Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit" to be served (by today depositing, at San Francisco, California, the said documents in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid) upon each of the following parties:

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3. To the best of my knowledge, all parties required to be served have been served with the petition.

Thomas R. Fahrner

Thomas R. Fahrner

Sworn and subscribed to
before me this 12th day
of August, 1988.

Nancy I Yamamoto

Notary Public

Supreme Court, U.S.
FILED
SEP 12. 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-277

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

SEAWINDS, LIMITED,
Petitioner,

VS.

NEDLLOYD LINES, B.V., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is petitioner's international maritime antitrust claim governed by the Shipping Act of 1984 (46 U.S.C. §§ 1701-1720), by which Congress eliminated the jurisdiction of district courts to hear private maritime antitrust actions and required claimants to proceed exclusively before the Federal Maritime Commission for compensation, or does section 108(a) of the Bankruptcy Code (11 U.S.C. § 108(a)) extend not only the Shipping Act's specific statute of limitations (46 U.S.C. § 1710(g)) but also its general one-year savings clause (46 U.S.C. § 1719(e)(2)(B)), thereby exempting petitioner's claim from the Shipping Act?

LIST OF PARTIES

Respondents herein are: Nedlloyd Lines, B.V.; Royal Nedlloyd Group, N.V.; KNSM Lines, B.V.; American President Companies, Ltd.; American President Lines, Ltd.; Sea-Land Corporation; Sea-Land Service, Inc.; Dampskibsselskabet AF 1912 A/S; A/S Dampskibsselskabet Svendborg; A.P. Moller-Maersk Line; Hapag-Lloyd Aktiengesselschaft; and Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT), B.V.).[1]

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[1] The listing required by Rule 28.1 appears as the appendix to this brief, at pp. A1-A3.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Statement of the Case	1
A. The statutory framework	1
B. The proceedings below	2
Reasons for Denying the Writ	3
I. There Is No Conflict of Decision, and No Important Question Is Presented	3
II. In Any Event, the Decision Below Is Correct	4
A. Section 108(a) does not extend the Shipping Act's one-year savings period for the application of prior law	4
B. In addition, Seawinds' antitrust claim on its face is based on post-Shipping Act conduct; any action based upon such conduct must be brought before the FMC	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, (1981)	6
Matter of Lauderdale Motor Car Corp., 35 B.R. 544, (Bankr.S.D.Fla. 1983)	5
Treadaway v. Academy of Motion Picture Arts, 783 F.2d 1418, (9th Cir. 1986)	6

Statutes

11 U.S.C. § 108(a)	i, 2, 3, 4, 5
46 U.S.C.:	
§§ 1701-1720	i
§ 1706(c)(2)	1
§ 1709	2
§ 1710(a)(g)	1
§ 1710(g)	i, 1
§ 1719(e)(2)(B)	i, 1

Other Authorities

H.R.Rep. No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C. Cong. & Ad. News 5963, 6275	5

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In the Supreme Court

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SEAWINDS, LIMITED,
Petitioner,

VS.

NEDLLOYD LINES, B.V., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. The statutory framework

As petitioner Seawinds, Limited, ("Seawinds") acknowledges (Pet., pp. 3-4), the Shipping Act of 1984 removed jurisdiction from the federal courts to hear private treble damage antitrust claims for activities in international maritime commerce prohibited by the Act (46 U.S.C. § 1706(c)(2)). Instead, such claims must be brought before the Federal Maritime Commission ("FMC"), which is authorized to award full (and sometimes double) compensation for all injuries incurred from conduct prohibited by the Act (46 U.S.C. § 1710(a)(g)). This proscription was subject to a narrow exception contained in a "savings clause" that preserved district court jurisdiction for pending antitrust actions and for antitrust actions brought with respect to conduct engaged in before March 20, 1984, if filed within one year from that date (46 U.S.C. § 1719(e)(2)(B)). The Shipping Act also contains a general three-year statute of limitations for claims covered by the Act (46 U.S.C. § 1710(g)).

Seawinds' petition calls into question application of section 108(a) of the Bankruptcy Code (11 U.S.C. § 108(a)) to the Shipping Act's savings clause—not its separate statute of limitations. Under section 108(a), a law that "fixes a period within which the debtor may commence an action" is extended until two years after the granting of a bankruptcy petition for relief.

B. The proceedings below

Seawinds' complaint alleged that respondents had conspired "to drive Seawinds out of [the international maritime shipping] business" in violation of sections 1 and 2 of the Sherman Act and that respondents were also liable to Seawinds on various pendent common law claims (C.R. 1, 9:25-27, 17:19-24:20). The alleged conduct is expressly prohibited by the Shipping Act (46 U.S.C. § 1709).[2]

On respondents' motion to dismiss for lack of subject matter jurisdiction, Seawinds contended that section 108(a) of the Bankruptcy Code applied not only to the Shipping Act's statute of limitations, but also to the Act's one-year savings clause, and that therefore its action was timely filed. The district court noted that section 108(a) has consistently been held "to toll statutes of limitations in appropriate circumstances," thus furthering "the bankruptcy policy of preserving assets of the estate, including a debtor's causes of action" (Pet., p. B12, n. 6, p. B14). The district court held, however, that it was the clear intent of Congress "to divest the courts of jurisdiction over federal maritime antitrust actions filed after the one-year period specified in [the savings clause]" (Pet., pp. B14-B15). Accordingly, section 108(a) could not be applied to contravene Congress' express removal of juris-

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[2] The specific overt acts in the pendent claims were alleged to have continued "at least until November 1984" (C.R. 1, 21:1-23:26). However, in a transparent attempt to avoid the jurisdictional mandate of the Shipping Act, Seawinds alleged that the antitrust conspiracy—which rested upon specific overt conduct identified in the pendent claims as occurring well beyond March 20, 1984—ceased on March 15, 1984, five days before the effective date of the Shipping Act (see discussion, *infra*, pp. 5-6).

diction from the district courts (ibid.). The Court of Appeals for the Ninth Circuit affirmed (Pet., pp. A1-A2).

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF DECISION, AND NO IMPORTANT QUESTION IS PRESENTED

Seawinds concedes that the district court's decision presents no conflict with any other decision, but it seeks to engage this Court's attention by asserting that the decision has "broad implications" and "far-reaching consequences" (Pet., pp. 3, 7). Seawinds' assessment of the importance of this case has no basis in fact. The particular question presented—namely, whether section 108(a) of the Bankruptcy Code should be applied to the savings clause of the Shipping Act—appears to be sui generis. The applicable time period has long since expired, and we are not aware of any other case in which the issue has arisen or could arise.

Seawinds does not assert otherwise.[3] Rather, Seawinds argues that the district court's decision may establish a precedent under which parties generally "will no longer be able to rely on Section 108(a) to protect the bankruptcy estate" (Pet., p. 12). This is patent nonsense. The decision below does not affect section 108(a)'s extension of applicable statutes of limitations (see Appx. B to Pet., at pp. B11-B12, and authorities cited therein). The district court's decision could be precedent *only* in the context of legislation containing a savings clause (which, by its nature, would be operative for a very limited period of time), such as that included in the Shipping Act, and a bankruptcy filing that brings into play section 108(a). Again, Seawinds points to no such situation, and we are aware of none.

Equally important, Seawinds' premise—that a bankruptcy estate might lose a valuable asset—is false. As Seawinds admits (Pet., p. 4), full reparations may be sought under the Shipping

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[3] Indeed, in the proceedings below, Seawinds acknowledged that the number of similar cases, if any, is "very small" and that the effect of any decision therefore would be "very, very, very limited" (RT 11/5/86, p. 22:2-3, 6-7).

Act. The Act simply changed the forum and, as a policy choice, eliminated the automatic treble damage penalties (while allowing some double damages). It did *not* eliminate the right of a debtor in bankruptcy to be made whole.

Hence, contrary to Seawinds' dire predictions, the decision below creates no uncertainty and will have no adverse effect on bankruptcy estates. Seawinds in fact refers to no statutory scheme under which any adverse effect might occur; its claims are thus entirely hypothetical. The prophesied "flood of costly and unmeritorious lawsuits" (Pet., p. 12) will not occur. Seawinds' labored attempt to create an important issue worthy of this Court's review utterly fails.

II. IN ANY EVENT, THE DECISION BELOW IS CORRECT

A. Section 108(a) does not extend the Shipping Act's one-year savings period for the application of prior law

Congress' fundamental purpose in enacting the 1984 Shipping Act was to consolidate the regulation of international ocean transportation in the FMC. This vesting of exclusive jurisdiction in the FMC reflected two policy judgments. First, Congress wished to alleviate the strain on international relations occasioned by courts' application of antitrust laws to international ocean commerce; second, Congress elected to eliminate the uncertainty generated by the dual jurisdiction exercised by the FMC and the district courts in such commerce (see authorities cited at Pet. Appx. B, pp. B5-B6). The FMC was chosen as the exclusive arbiter of international competition within the United States maritime shipping industry because it has particular expertise in maritime matters and can speak with a single, consistent voice (ibid.).

The policy underlying section 108(a) of the Bankruptcy Act is equally clear. In order to facilitate compensation to bankruptcy estates, that provision grants debtors and their trustees additional time within which to commence proceedings to recover monies owed the estate without fear that those claims will be time-barred; "[s]ubsection (a) extends any statute of limitation for commencing or continuing an action by the debtor" (H.R.Rep.

No. 595, 95th Cong., 1st Sess. 318, reprinted in 1978 U.S.C. Cong. & Ad. News 5963, 6275). Thus, Congress' concern was directed at statutes that would *eliminate* claims belonging to the estate:

> "Section 108(a) extends statutes of limitation on causes of actions which might otherwise expire after the commencement of a bankruptcy case." *Matter of Lauderdale Motor Car Corp.*, 35 B.R. 544, 549 (Bankr.S.D.Fla. 1983).

The district court's decision gives full effect to the policies underlying both section 108(a) and the Shipping Act. Because the bankrupt estate can be *compensated and made whole* in proceedings before the FMC, the policies underlying the bankruptcy laws will be served by honoring Congress' intent to remit international maritime claims to the FMC. Indeed, a bankrupt estate will obtain the benefit of section 108(a) by its application to the Shipping Act's statute of limitations in FMC proceedings. However, allowing Seawinds to proceed in the district court—against, inter alia, several foreign shipping companies—would frustrate the intent of Congress in vesting exclusive jurisdiction in the FMC.

Seawinds bases its argument to the contrary on cases that hold section 108(a) applicable to both "substantive" and "procedural" statutes of limitations (see Pet., pp. 7, 9-10). Those decisions are in accord with Congress' intent to extend all statutes that would cause actions to be time-barred. However, they are irrelevant to consideration of the savings clause here, which serves the manifestly different purpose of providing for an orderly transfer of jurisdiction between the district court and the FMC to adjudicate international maritime claims.

B. In addition, Seawinds' antitrust claim on its face is based on post-Shipping Act conduct; any action based upon such conduct must be brought before the FMC

It is undisputed that Seawinds was required to proceed before the FMC if its action was based upon alleged misconduct occurring *after* March 20, 1984. Review of Seawinds' complaint dem-

onstrates conclusively that Seawinds' antitrust claim involves numerous such purported acts.[4]

Seawinds argued below that, despite its specific allegations of precise dates of particular overt acts, it could avoid the jurisdiction of the FMC simply by inclusion of a general, conclusory allegation that the purported antitrust conspiracy came to an abrupt halt on March 15, 1984, five days before the Shipping Act's effective date. However, a party cannot, by such artful pleading, avoid jurisdictional mandates. *Treadaway v. Academy of Motion Picture Arts*, 783 F.2d 1418, 1421, n. 3 (9th Cir. 1986); see *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n. 2 (1981). Hence, even though the district court did not pass upon this issue, its decision is also correct because Seawinds alleges antitrust misconduct occurring after the effective date of the Shipping Act.

---

[4] Although the antitrust cause of action does not allege the specific date of occurrence of any of the overt acts sued upon, Seawinds alleged that certain acts were a part of the asserted conspiracy and were also the basis for its pendent common law claims (CR 1, 9:25-28, 11:25-12:8, 12:10-21, 21:1-15, 28:23-29:3). The complaint expressly alleges that such acts occurred at various specified times after March 20, 1984 and "at least until November 1984" (C.R. 1, 21:1-23:26).

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated: San Francisco, California, September 12, 1988.

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APPENDIX A

Rule 28.1 Listing

The subsidiaries (other than wholly owned subsidiaries) and affiliates of Nedlloyd Lines B.V., Royal Nedlloyd Group N.W., and KNSM Lines B.V. are:

Seabridge Australia Pty. Ltd.
Seabridge (NZ) Ltd.
Seaways Leasing Company Ltd.
Astec N.V.
Tropicbird N.V.
Vuelpicado SA
Brink's-Gerlach B.V.
Paris Air Courier SA
France Air Groupage SA
Bell Transport N.V.
Envios Uegentes Mundiales SA
Blackstone Oil Company
Crescent NDL Partnership 1985
Crescent NDL Partnership 1986
Smit Internationale N.V.
Nederlandse Silo-, Elevator- en Graanfactormaatschappij N.V.
Nieuw Rotterdam Beheer N.V.
Nieuw Rotterdam Leven N.V.
Nimox N.V.
Asia Australia Express Ltd.
Nedlloyd Swire Pty. Ltd.
Orchid (Holdings) Pty. Ltd.
Australian Document Exchange Pty. Ltd.
Pacific Oriëntal Terminal Comp. (Potco)
Plataformas Y Servicios S.A.
Cliffs Neddrill Turnkey International
V.o.F.
Delta North Transportation Ltd.

The parent company of Sea-Land Corporation is CSX Corporation. The parent company of Sea-Land Service, Inc., is Sea-Land Corporation. The subsidiaries (other than wholly owned subsidiaries) and affiliates of Sea-Land Service, Inc., are:

Arabian Container Terminals, Limited
Asia Terminals Limited
Entremar, S.A.
Sea-Land Container Terminal Administration Co., Ltd.
World Feederships, Inc.

The subsidiaires (other than wholly owned subsidiaries) and affiliates of Dampskibsselkskabet AF 1912 A/S, A/S Dampskibsselkskabet Svenborg, A.P. Moller-Maersk Line, and Hapag-Lloyd Aktiengesellschaft are:

Hapag-Lloyd

UNIKAI Hafenbetrieb GmbH
(Hamburg, West Germany)
Hapag-Lloyd Reisebüro GmbH Köln
(Köln, West Germany)
Deutsche Flugzeugvermietungs AG & Co. KG
(Stapelfeld, West Germany)

Maersk

Maersk Inc.
(Madison, New Jersey)
Maersk Line (Hong Kong) Ltd.
(Causeway Bay, Hong Kong)
Maersk Line K.K.
(Tokyo, Japan)
Maersk Line (Singapore) PTE. Ltd.
(Singapore)

The parent company of Incotrans B.V., Rotterdam, The Netherlands (formerly Intercontinental Transport (ICT) B.V.) is Incotrans Holding B.V., Rotterdam, The Netherlands. Its subsidiaries (other than wholly owned subsidiaries) and affiliates are:

Subsidiares

Incotrans Germany GmbH, Düsseldorf, W. Germany
Incotrans GmbH Linien Agentur, Bremen, W. Germany
Oranje Lijn (Maatschappij Zeetransport) BV, Rotterdam, The Netherlands
Incotrans SA, Madrid, Spain
Atlantic Container Line BV, Rotterdam, The Netherlands
Atlantic Container Line Ltd., Hamilton, Bermuda
Gulf Container Line (GCL) BV, Rotterdam, The Netherlands
Cetraco NV, Antwerp, Belgium
Combined Tonnage Center GmbH, Hamburg, W. Germany
Central Equipment Management Ltd., Southampton, United Kingdom

Affiliates (affiliated via the parent company)

Incotrans Ships BV, Rotterdam, The Netherlands
Scheepvaart Maatschappij "Trans-Oceaan" BV, Rotterdam, The Netherlands
ICT Vrachtbedrijf BV, Rotterdam, The Netherlands
Translogistic BV, Rotterdam, The Netherlands
Interkade BV, Rotterdam, The Netherlands
Gedeno BV, Rotterdam, The Netherlands

American President Companies, Ltd., and American President Lines, Ltd., have no subsidiaries (other than wholly owned subsidiaries) or affiliates.

Supreme Court, U.S.
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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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Dated: September 23, 1988

TABLE OF CONTENTS

PAGE

I. THE ISSUE PRESENTED IS ONE OF FIRST IMPRESSION AND MERITS REVIEW BY THIS COURT 2

II. THE DECISION BELOW IS ERRONEOUS 3

A. Section 108(a) Extends The One-Year Period Fixed In Section 20(e)(2)(B) 3

B. Whether Seawinds Has A Remedy In The FMC Is Neither Clear Nor Relevant 4

C. Seawinds' Antitrust Claim Is Based Entirely On Pre-Shipping Act Conduct 5

III. CONCLUSION 6

TABLE OF AUTHORITIES

CASES	PAGE(S)
Bradley v. Richmond School Board, 416 U.S. 696 (1974)	4
Brazinski v. Mikatavage, 29 Pa.D.& C. 551 (1937)	2, 5
Compagnie Generale Maritime v. S.E.L. Maduro (Florida), Inc., 23 S.R.R. 1085 (Adm.L.J. FMC 1986)	4, 5
In re Graham, 24 Bankr. 305 (Bankr.N.D.Iowa 1982), *aff'd*, 726 F.2d 1268 (8th Cir. 1984)	5
In re T.C.I., Ltd., 21 Bankr. 876 (Bankr.N.D.Ill. 1982)	3
Wilson v. Turnage, 750 F.2d 1086 (D.C.Cir. 1984), *vacated on other grounds*, 755 F.2d 967 (D.C.Cir. 1985)	4
STATUTES	
11 U.S.C. §108(a)	*passim*
46 U.S.C. §1719(e)(2)(B)	4
OTHER AUTHORITIES	
Application Of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984, 49 Fed.Reg. 21,798 (1984)	4

No. 88-277

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Supreme Court of the United States

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Petitioner,

v.

NEDLLOYD LINES, B.V., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

In their opposition brief, respondents mischaracterize the nature of the matter at issue and misstate both the relevant facts and the law applicable thereto. Accordingly, a brief reply is in order.

I.

THE ISSUE PRESENTED IS ONE OF FIRST IMPRESSION AND MERITS REVIEW BY THIS COURT

Respondents do not dispute that the issue presented is one of first impression, and they concede that the decision below stands as a precedent precluding application of Section 108(a) of the Bankruptcy Code to extend statutory filing periods which are not contained in statutes of limitation. Opp.Br., p. 3. Respondents attempt to minimize the implications of that decision, however, by suggesting that filing periods of the type included in the Shipping Act are unique to that Act and are not to be found in other legislation. Thus, respondents imply the decision below affects Seawinds and Seawinds alone. There is no merit to this contention.

Contrary to respondents' apparent belief, it is clear that time periods of the type contained in the Shipping Act have been enacted in other provisions of law. *See, e.g., Brazinski v. Mikatavage*, 29 Pa.D. & C. 551, 552-53 (1937) (statute forever abolishing cause of action for breach of contract to marry saved actions commenced within 60 days of enactment). It is also a virtual certainty that such time periods will continue to be legislated; indeed, such periods will exist every time a state legislature or Congress acts to limit or abolish an existing cause of action but reserves the right to bring such actions for a period of time after the limitation or abolition would otherwise take effect. Obviously, the decision below will preclude application of Section 108(a) with respect to all such time periods, so it cannot be said that the decision bears solely on this case. To the contrary, the issue presented in this case will recur in other cases far into the future.

In any event, the impact of the decision below is not limited only to cases where it might be cited as precedent to preclude claims brought on behalf of a bankruptcy estate. In fact, it has broad implications for virtually every case in which Section 108(a) could be invoked. This follows from the fundamental fact (which respondents ignore) that what makes Section 108(a) effective is the perception by trustees and debtors-in-possession that they can rely on it to preserve

the assets of the bankruptcy estate. Once it is established that a trustee or debtor-in-possession may not rely on Section 108(a) to interdict *any* and *all* time periods that might bar a potential cause of action on behalf of the bankrupt, however, this perception will be destroyed, and the trustee or debtor-in-possession will have no choice but to either immediately file all claims the bankruptcy estate may conceivably have or undertake an onerous and expensive investigation to assure that there are no time provisions in existence which cannot be tolled by Section 108(a). To do otherwise would risk forfeiting a potential claim on the off chance that a particular time limit might not be considered a statute of limitation to which Section 108(a) may be applied. Either course of action inevitably undermines Congress' policy and purpose of preserving the assets of the bankruptcy estate. For that reason alone, the question presented constitutes an important issue which merits resolution by this Court.

II.

THE DECISION BELOW IS ERRONEOUS

A. Section 108(a) Extends The One-Year Period Fixed In Section 20(e)(2)(B).

Contrary to respondents' contention, there is nothing in the legislative history of Section 108(a) or in the case law to suggest that the reach of that provision extends only to statutes of limitation. Respondents' authorities merely affirm that Section 108(a) extends statutes of limitation; they do not suggest that Section 108(a) may not have other applications as well. Seawinds' authorities, on the other hand, indicate that Section 108(a) extends all time periods fixed by applicable nonbankruptcy law, whether they are fixed in a statute of limitation or some other provision of law. *See, e.g., In re T.C.I., Ltd.*, 21 Bankr. 876 (Bankr.N.D.Ill. 1982) (holding that Section 108(a) extended the substantive time period at issue therein, even though that provision, unlike a statute of limitation, "constitute[d] a condition precedent to asserting a cause of action"; the court never once even alluded to the

time provision at issue therein as a statute of limitation, substantive or otherwise). Moreover, even assuming, as respondents do, that Section 108(a) can be applied only to statutes of limitation, it would still operate to extend the one-year time period fixed in Section 20(e)(2)(B) of the 1984 Shipping Act because, as the district court recognized, that period actually functions as a traditional statute of limitation. Pet., Appendix B at B13-B14. *See also Compagnie Generale Maritime v. S.E.L. Maduro (Florida), Inc.*, 23 S.R.R. 1085, 1090 (Adm.L.J. FMC 1986) (stating that Section 20(e)(2)(B) provides a "one-year period of limitation").[1]

B. Whether Seawinds Has A Remedy In The FMC Is Neither Clear Nor Relevant.

It is by no means clear, as respondents claim, that Seawinds has an effective remedy in an administrative proceeding before the Federal Maritime Commission ("FMC"). Indeed, the FMC has declined to make any across-the-board ruling that the 1984 Shipping Act will or will not apply to pre-Act conduct such as that alleged by Seawinds. Instead, the FMC has stated that the issue must be decided on a case-by-case basis to determine whether retroactive application would, under the circumstances of a particular case, lead to "manifest injustice," as defined by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *See Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 49 Fed.Reg. 21,798 (1984). Pursuant to that determination, the FMC has, in a number of cases, demonstrated a reluctance to apply provisions of the 1984 Shipping Act to pre-Act conduct where there is doubt as to whether the conduct prohibited in the new Act was also proscribed by the predecessor Shipping Act

[1] The fact that Section 20(e)(2)(B) operates as a statute of limitation with respect to suits filed after March 20, 1984 clearly distinguishes that section from typical savings clauses, which save only *pending* actions. *See, e.g., Wilson v. Turnage*, 750 F.2d 1086, 1089 (D.C.Cir. 1984), *vacated on other grounds*, 755 F.2d 967 (D.C.Cir. 1985).

of 1916. *See, e.g., Compagnie Generale Maritime, supra,* 23 S.R.R. at 1086 n.1.[2]

In any event, whether Seawinds has any remedy in the FMC is not germane to the issue presented in this case. Applicability of Section 108(a) does not turn on the presence or absence of alternative remedies that may be available to the bankruptcy estate, for Section 108(a) is not concerned with remedies. Rather, it allows a trustee or debtor-in-possession to maintain any action on behalf of the estate that the bankrupt could have asserted when it filed for bankruptcy. *In re Graham,* 24 Bankr. 305, 313 (Bankr.N.D.Iowa 1982), *aff'd,* 726 F.2d 1268 (8th Cir. 1984). Otherwise, Section 108(a) presumably would have no application in any case where the bankruptcy estate has at least one cause of action which is not time-barred by an applicable limitation period. Such a result cannot be reconciled with the plain language and broad policies of Section 108(a).

C. Seawinds' Antitrust Claim Is Based Entirely On Pre-Shipping Act Conduct.

There is no merit whatsoever to respondents' claim that Seawinds' action is "based on post-Shipping Act conduct." Opp.Br., p. 5. The "artful pleading" doctrine on which respondents rely has no application here, because the complaint clearly seeks damages under the antitrust laws for only pre-Shipping Act conduct. Respondents' blatant misrepresentations cannot change that fact. Moreover, as respondents admit, the district court did not pass upon this issue, and the court of appeals affirmed the judgment of the district court "substantially for the reasons stated in its opinion."

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[2] Even assuming, *arguendo,* that Seawinds has an alternative remedy in this case, it is not correct, as respondents contend, that the decision below will have no adverse effect on bankruptcy estates in other cases. Clearly, if a legislature decides to abolish an existing cause of action, it is under no duty to establish a substitute enforcement mechanism and, in fact, in many cases it may not. *See, e.g., Brazinski v. Mikatavage,* 29 Pa.D.& C. 551 (1937) (statute forever abolished cause of action for breach of promise to marry without providing for any alternative action). In such cases, the decision below would obviously have an adverse impact on a bankruptcy estate.

III.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, petitioner respectfully requests that this Court issue a writ of *certiorari*.

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